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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948.

No. 17.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO.

No. 18.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO.

REPLY BRIEF OF PETITIONER.

ASSUMING THAT PETITIONER'S ARREST WAS LAWFUL, STILL THE SEARCH AND SEIZURE OF PETITIONER'S BOOKS CONSTITUTED AN UNREASONABLE SEARCH AND SEIZURE.

It is contended by Respondent that the search and seizure was reasonable because it was incident to a lawful arrest. If we concede that the arrest was lawful, nevertheless that does not give an officer the right to make an unreasonable search and seizure. "The mere fact that there is a

valid arrest, does not *ipso facto* legalize a search or seizure without a warrant." *Trupiano v. United States*, 334 U. S. 669, 708.

The right of search and seizure as incident to a lawful arrest, this Court said in the above case, "grows out of the inherent necessities of the situation at the time of the arrest" (p. 708). Here, there was no such necessity. The officers who went to the doctor's office to get evidence had ample time to get a search warrant, but their difficulty was that no court would issue a warrant to search and seize a doctor's professional books. Furthermore, the officers did not know whether there were any books, where the books were, or what they contained. Hence, it would be impossible to make the affidavit specifically describing the thing to be seized or the place to be searched. Surely, it cannot be successfully argued that because it was legally and constitutionally impossible to obtain a search warrant, that, therefore, a warrant could be dispensed with.

Only where the articles seized are contraband is a search or seizure without warrant justified. *United States v. Lefkowitz*, 285 U. S. 452, *Davis v. United States*, 328 U. S. 582, *Harris v. United States*, 331 U. S. 145. Here the articles seized were of a purely evidentiary nature—the private records of a physician. The Colorado court does not condone the seizure, but holds that the records are admissible in evidence notwithstanding that they were unlawfully obtained (17 R. 54, 55).

In *Harris v. United States*, 331 U. S. 145, 154, this Court stated:

> "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected and property the possession of which is a crime. [Citing cases]."

Respondent urges that the federal Constitution may be violated by state officers because of a rule of evidence and because of "necessity." We maintain this is manifestly erroneous. Numerous decisions of this Court make it clear that neither a rule of evidence nor the plea of necessity justifies the violation of a Constitutional right. We will refer to these decisions further on in this brief. Respondent quotes from the decision of *Carroll v. United States*, 267 U. S. 132. The excerpt from that decision cited in respondent's brief does not reveal the true holding of the Court. It omitted the words:

> "* * * that an automobile or other vehicle contains that which by law is subject to seizure and destruction * * *"

This language omitted from the quotation in the Respondent's brief completely changes the significance of the decision. We are not concerned here with the right to search an automobile or any other vehicle. Furthermore, the doctrine enunciated in the *Carroll* case was specifically limited to search and seizure under the National Prohibition Act by the subsequent decision of this Court in *United States v. DiRe*, 332 U. S. 581.

THE ABSENCE OF FORCE DOES NOT MAKE AN UNREASONABLE SEARCH AND SEIZURE LAWFUL.

It is next contended by Respondent that the officers in this case did not engage in an exploratory search because there was no breaking of locks, rummaging through drawers, or opening of closed receptacles, and no force of any kind. The officers were very meticulous to say that they merely picked up the books under the instruction to "get the evidence" (17 R. 11-14). This euphemism does not change the fact that there was both a search and seizure. Certainly, a man does not lose the right of privacy because he does not constantly keep his books under lock and key, any more than a householder would be precluded from complaining of theft because he left his door unlocked. Petitioner's Constitutional right was not lost because he had his books on his desk in his private office.

In *Trupiano v. United States*, 334 U. S. 669, 707, this Court said:

> "Moreover, the proximity of the contraband property to the person of Antoniole at the moment of his arrest was a fortuitous circumstance which was inadequate to legalize the seizure."

We also submit that there was a rummaging and searching of petitioner's books both in his private office, as well as on the outside (17 R. 12-14). As to the absence of force which is suggested by the Attorney General, we say that the petitioner did not lose his Constitutional right because he did not resist four officers of the law who had the potential force to do what they wanted to do. They were there to get the evidence and they had the power to get it regardless of any resistance that petitioner might have offered. *United States v. DiRe, supra*

THE FACT THAT THE BOOKS WERE VISIBLE TO THE OFFICERS DID NOT JUSTIFY THEIR SEIZURE.

It is contended by Respondent that because the books were lying in plain sight on a table and on a book case in petitioner's private office that they were subject to seizure as an incident to petitioner's arrest. This theory is clearly contrary to the decisions of this Court. In *Trupiano v. United States*, 334 U. S. 669, 708, the Court said:

> "In other words, the presence or absence of an arrestee at the exact time and place of a forseeable and anticipated seizure does not determine the validity of that seizure if it occurs without a warrant. Rather the test is the apparent need for summary seizure, a test which clearly is not satisfied by the facts before us."

That the Constitutional protection against unreasonable search and seizure extends to both searches and seizures was stated by Chief Justice Taft in the case of *Olmstead v. United States*, 277 U. S. 438, 463:

> "The well-known historical purpose of the Fourth Amendment, directed against general warrants and

writs of assistance was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, *and to prevent their seizure against his will.*" (Italics ours.)

The Circuit Court of Appeals for the ninth circuit, quoting from the concurring opinion in the *Boyd* case, points out the dual protection against both search and seizure:

> "But the authority to search cannot be confused with the authority to seize. It cannot be confused with the power to use seized articles in evidence. The Fourth Amendment prohibits unreasonable searches and seizures. The distinction has never been more carefully drawn than in the language used by Mr. Justice Miller in the concurring opinion in the case of Boyd v. United States, 116 U. S. 616, 641; 6 S. Ct. 534, 538, 29 L. Ed. 746. It is there said:
>
> "'The searches meant by the constitution were such as led to seizure when the search was successful.'
>
> "And again: '*The things here forbidden are two: search and seizure*'." (Italics ours.) Takahashi v. United States, 143 F. (2d) 118, 123, C. C. A. 9th.

THE RULE AGAINST UNREASONABLE SEARCH AND SEIZURE CANNOT BE EVADED BY RESORT TO A "RULE OF EVIDENCE."

Respondent argues that the books and the information obtained were admissible as evidence regardless of the Constitutional immunity. To which we answer that a rule of evidence cannot destroy a Constitutional right. *Truax v. Corrigan*, 257 U. S. 312, *Pollock v. Williams*, 322 U. S. 4, *Bailey v. Alabama*, 219 U. S. 219. No discussion is necessary to show that Constitutional rights would be utterly illusory if they could be nullified by a rule of evidence. It is true, as we argued in the opening brief, that the Fourteenth Amendment protects the citizen, and indeed every human being, from police invasion of the right of privacy. Our argument is based upon the proposition that this is a

right which necessarily goes with freedom and liberty. Counsel offers nothing in rebuttal.

It is true that in the Slaughter House Cases a distinction is drawn between the rights and immunities of United States citizenship and state citizenship. It is also true that the right of immunity from unreasonable search and seizure is not in the category of rights that attach to national citizenship under the doctrine of the Slaughter House Cases. But neither are freedom of conscience, speech, assembly, or the right to have counsel included in such category. It is suggested in the brief of Respondent that the protection of due process goes only to matters of procedure. More specifically, it is contended by Respondent that if there is a fair trial, adequate notice, and a day in court, due process has been satisfied. But this Court has decided that freedom of conscience, assembly, and speech, which have nothing to do with trial procedure, are guaranteed by the due process clause.

FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE IS "OF THE VERY ESSENCE OF CONSTITUTIONAL LIBERTY" AND, THEREFORE, PROTECTED BY THE DUE-PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

An Associated Press dispatch from Prague published in the Denver Post under date of September 19, 1948, reports the adoption of a new Czechoslovakian "constitution." According to the dispatch, "The new constitution provides that a search and seizure may be made without a warrant if the warrant is issued within forty-eight hours." This clearly shows that search and seizure of private books and records is a necessary attribute of a totalitarian government. World opinion today, led by this country, definitely holds that the loss of freedom in Czechoslovakia, or any other country, jeopardizes our freedom here. Yet, it is contended in this Court that a citizen's Constitutional right of privacy is not jeopardized by the action of state officers who ruthlessly violate it. Under that theory the citizen would be only half free. We quote from Mr. Justice Suther-

land in the case of *Jones v. Securities and Exchange Commission*, 297 U. S. 1, 24:

> "'Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day, 'there is no place in our constitutional system for the exercise of arbitrary power.' Garfield v. U. S. ex rel. Goldsby, 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168."

Respondent strongly relies on the case of *Marron v. United States*, 275 U. S. 192. In that case there was a continuous, open violation of the law. The articles seized in that case were taken from a saloon being operated as part of a conspiracy to violate the law. The later decisions of *Go-Bart Importing Company v. United States*, 282 U. S. 344, and *United States v. Lefkowitz*, 285 U. S. 452, limit the rule of the *Marron* case to the particular facts existing in that case. As pointed out in the case of *Davis v. United States*, 328 U. S. 582, there is a vast difference between the seizure of private records and that of records kept pursuant to the requirements of law, and subject to inspection by law enforcement officers. The books seized from petitioner's office were private, contained confidential information pertaining to petitioner's patients and were not subject to inspection by police officers. The seizure of such evidentiary matter has always been distinguished from the seizure of contraband articles or the fruits of crime. See *Davis v. United States, supra, United States v. Lefkowitz, supra.*

We quote from the case of *Gouled v. United States*, 255 U. S. 298, 303-304:

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup.

Ct. 182, 64 L. Ed. 319) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments [Fourth and Fifth]. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers."

Respectfully submitted,

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